UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES ATLANTA BRANCH OFFICE

NAACP HOUSTON BRANCH

and Case 16-CA-27783

TRACIE JACKSON, an Individual

Jamal M. Allen, Esq., for the General Counsel. Melvin Houston and Alfred Benoit, Esqs., for the Respondent. Salvador Benavidez, Esq., for the Charging Party.

DECISION

Statement of the Case

GEORGE CARSON II, Administrative Law Judge. This case was tried in Houston, Texas, on May 12, 2011, pursuant to a complaint that issued on February 28, 2011. The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by refusing to hire Charging Party Tracie Jackson because of her protected concerted activities. As hereinafter discussed, the refusal to hire was a refusal to rehire. Jackson was employed by the Respondent at the time she engaged in the protected concerted activities alleged in the complaint. The answer of the Respondent denies any violation of the Act. I find that the Respondent violated the Act as alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed by the General Counsel and the proposed findings of fact filed by the Respondent, I make the following 2

Findings of Fact

I. Jurisdiction

The Respondent, NAACP Houston Branch, hereinafter referred to as the Houston Branch or Respondent, is a Texas nonprofit corporation with offices in Houston, Texas, engaged in civil rights advocacy. The Houston Branch annually derives gross revenues from local, State, and Federal grants in excess of \$250,000. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

¹ All dates are in 2010, unless otherwise indicated. The charge was filed on December 3.

² The Respondent's proposed findings of fact include references to prior positions held by James Douglas. That evidence is not on the record, and I have not considered it.

II. Alleged Unfair Labor Practices

A. Overview

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This case arises as a result of the Houston Branch failing to rehire attorney Tracie Jackson. Jackson was initially hired on May 3 as the employment law staff attorney. She was interviewed by Executive Director Yolanda Smith at the Houston Branch office on Wheeler Street. She was terminated when the grant that funded her position expired. The grant was renewed. Jackson reapplied for the position that she had formerly held, but she was not hired.

The governing body of the Houston Branch is its elected board of directors. Day to day operations are overseen by Executive Director Yolanda Smith. Legal counsel to the board is Professor Emeritus James Douglas of Texas Southern University, Thurgood Marshall School of Law. Douglas is on the board of directors and attends certain committee meetings. In June 2010, Linda Dunson was the legal advocacy director of the Houston Branch. She oversaw the work of two attorneys, Tracie Jackson and Lakeshia Vaughn Jackson, hereinafter referred to using her full name to avoid any confusion with Charging Party Tracie Jackson to whom I will refer to as Jackson. Dunson reported to Smith through Operations Director Sharonda Wright. Dunson, as legal advocacy director, had the responsibility to "[s]upervise, train and evaluate all legal support staff" which included paralegal Kevin Fields, administrative assistant Yvette Flores, and part time paralegal Michael Hohenstein, who resigned on June 14.

The basic operations of the Houston Branch are funded by proceeds from the Freedom Fund banquet, held annually each October. Financial support for various programs is provided by multiple sources. The grant source directly relevant to this proceeding was the Texas Access to Justice Foundation that provided a Basic Civil Legal Service (BCLS) grant that funded the employment law staff attorney position, the position held by Jackson. A grant from the Ryan White Program funded the position of Lakeshia Vaughn Jackson, who provided legal services for people "dealing with HIV or AIDS."

The effective dates of the grants varied. The BCLS grant ran from September 1 through August 31, and was paid out in four installments. The Ryan White grant was from March 1 through February 28. Prior to 2010, individuals holding positions funded by various grants had continued in those positions if the applicable grant was renewed.

B. Facts

On Friday, June 11, Operations Director Sharonda Wright informed Dunson and Supervisor Bernice Arenyeka that, due to a cash flow problem, the Houston Branch might not be able to pay employees on their next payday, Tuesday, June 15. Dunson met with the legal staff and explained that they might not be able to be paid on the upcoming Tuesday. Jackson was not present. She was at the annual Texas State Bar convention in Fort Worth where she served on an employment law panel.

On Monday, June 14, Dunson informed Jackson of the problem. Jackson returned to her office and engaged in research on the website of the Texas Workforce Commission. She learned that the Texas Payday Act "mandated that an employer pay its employees on a regular and consistent basis." She reported this to Dunson in the presence of other employees in the legal section. Smith was not at the office. Jackson asked who else she could talk to. Dunson gave her the name of Johnny Gentry, who was assistant treasurer of the Houston Branch and

who signed the employees' paychecks. Jackson called him and learned that he was unaware of any problem, that "we have the money; I don't understand why you're not getting a paycheck."

Executive Director Smith was still out of her office. Dunson reported to Operations Director Wright that the employees were upset and that Jackson had informed them that they could file wage claims with the Texas Workforce Commission. Jackson sent an e-mail to Smith requesting that she address the staff to discuss the situation. The e-mail notes that the failure to pay the employees in a timely manner could have legal consequences, "i.e. possible complaints to the Texas Workforce Commission."

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Dunson, Jackson, Lakeshia Vaughn Jackson, paralegal Fields, administrative assistant Yvette Flores, and an intern working in the legal section went to lunch where they continued to discuss their concerns with each other.

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That afternoon, Smith did address the staff, explaining that the Houston Branch was trying to contact persons responsible for the various grants in an effort to have funds released in advance. Various employees made comments and asked questions. Jackson pointed out that "we" are funded by grants, and did not understand why there was a problem. Smith explained that the grants came in quarterly disbursements. Part time paralegal Hohenstein asked whether the board of directors was aware of the problem. Smith initially stated that the board was aware and then amended her answer, explaining that she had not spoken with every board member but that she had spoken with Board President Carolyn Scantlebury.

After that meeting, Jackson met with Dunson and obtained the e-mail addresses of the members of the board of directors. She then sent the following email:

Dear Board Members:

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My name is Tracie Jackson and I am a new hire to the Houston branch. I am writing to request permission to speak at the board meeting this evening concerning the branch's apparent inability to meet payroll. This is of grave concern, and as an employment attorney, I know first hand of the possible legal consequences that can arise when an employer fails to pay its employees in a timely manner. Your prompt attention to this matter is greatly appreciated.

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Board President Scantlebury replied.

Hi Tracie.

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The payment of wages for your grant is a concern to all. Agencies across this country and city are experiencing similar problems.

We have to wait for payment from lota [sic] to pay your salary.3 The NAACP has filled the gap previously, but as with most Non-profits, funds are tight.

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I will address the board about the overall financial condition. We are discussing alternate solutions, but legal threats are inappropriate.

The record does not establish why Scantlebury considered the reference to "legal consequences" to be a threat rather than a statement of fact. Scantlebury did not testify.

³ Jackson was paid under the BCLS grant.

Jackson, Lakeshia Vaughn Jackson, and Kevin Fields, as well as Operations Director Sharonda Wright and Supervisors Dunson and Arenyeka went to the board of directors meeting. Douglas, legal counsel to the board, acknowledged seeing Jackson there. Dunson recalled that, when Executive Director Smith arrived at the board meeting, she informed the employees that "she had gotten part of the money." About 2 hours later, Young came out of the meeting and stated that "she got the rest of the money." Despite being assured that they would be paid, the employees remained in order to speak. As they were waiting to be invited into the meeting, Dunson overheard President Scantlebury state that the employees were lucky to have jobs and she had "no sympathy" for them. Lakeshia Vaughn Jackson overheard an unidentified person refer to Jackson's e-mail as threatening, just as Scantlebury had in her reply to Jackson.

Jackson spoke first, giving some of her background in employment law, questioning why they had gone through this, and noting that it was "kind of humiliating" to have to "wait to talk to our employer about getting paid." Dunson noted that Jackson spoke "forcefully." Fields spoke, explaining that he was a veteran and that the first duty of a military commander is to take care of his troops. Lakeshia Vaughn Jackson and Dunson also spoke.

Douglas recalled that Smith informed him that the Houston Branch was short about \$20,000, on June 10 or 11, the Thursday or Friday before the upcoming payday. He testified he made a call and "got \$20,000, to make sure that the staff was paid" on time. According to Douglas, Smith "was in the office when I made the telephone call, but the board had to approve it, and so she asked me if I would come to [the] meeting on Monday evening and explain everything."

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Although not relevant to the protected concerted activity issue, I question Douglas' recollection regarding the date he made the call and whether Smith was present. On June 14, when Smith met with the employees, she referred to the quarterly release of funds. If she knew that Douglas had procured the funds necessary to meet the payroll and that it was simply a matter of the board of directors accepting that money, I am satisfied that she would have so informed the employees thereby alleviating their expressed concerns regarding whether they were going to be paid on time.

On June 29, some 2 weeks after the board meeting, Douglas attended a meeting of the Houston Branch personnel committee. Douglas was not a member of the committee, but as legal counsel was invited to attend. The agenda of the meeting related to the status of grants and employees working under the grants, the payroll issues, "the concerns of the grant employees and *their behavior*" [emphasis added], and recommended actions.

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The personnel committee recommended that the executive director prepare a report showing whether the total costs from implementing a grant required "supplemental operating and other costs." It then recommended that the executive committee determine whether to continue to seek grant funds that required expenditures "above the grant allocations." In an action unrelated to grant costs, the committee recommended that the executive director inform all employees working under a grant that "upon expiration of the grant . . . [that] they will no longer be employed . . . and that they may re-apply . . . if the Branch re-applies for a grant, receives such and accepts grant funds for a future grant period."

Douglas, when asked about the item relating to employee behavior, answered, "I have absolutely no idea." I doubt the veracity of the foregoing response. The recommendation relating to current employees having to reapply for their current positions was unrelated to the issues concerning grant costs. The only agenda item that could have resulted in such a

recommendation was the one related to employee concerns and "their behavior."

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Although the recommendations of the personnel committee were not approved by the board of directors until August 16, on July 30, Board President Scantlebury addressed the Houston Branch employees and explained the concern regarding additional costs beyond what a specific grant covered. She distributed letters that referred specifically to the grant under which each employee worked. The letter received by Jackson states, in pertinent part:

If the Executive Committee continues the BCLS Program grant, your employment . . . may be continued. . . . If, however, the Executive Committee decides not to continue the said grant, your employment with the NAACP will be discontinued on August 31, 2010.

On August 2, Jackson called Jonathan Vickery, director of grants for the Texas Access to Justice Foundation. She informed him of the payroll problem that had occurred in June that affected all employees and complained individually that she had not been reimbursed for her attendance at the Texas State Bar meeting. Vickery called Dunson, who he knew was "the supervising attorney." Dunson confirmed the information that Jackson had given Vickery. He asked whether there was any suspicion that funds were being misappropriated. Dunson responded that she did not want to get involved because there was a "target" on her back because of her joining with Jackson and other employees regarding the payroll issue.

Vickery, who makes it a practice not to reveal the names of complaining employees, called Smith and informed her that he had been contacted by "employees" and that it was his understanding that employees were not getting paid. Smith assured Vickery that the employees had been paid, noting that it was a "challenge" because Federal grants were paid on a cost reimbursement basis and that the Houston Branch had to spend funds before being reimbursed which caused a cash flow problem. Smith then spontaneously brought up Jackson's name, stating that she was "a problem employee" who "was causing morale problems." Vickery did not question Smith regarding a personnel matter, and he did not confirm to Smith that it was Jackson who had called him. He had told Smith that he had been contacted by "employees."

On September 25, Dunson, who had been terminated on August 31 when her grant expired, attended a banquet at the Missouri City Branch of the NAACP. At the banquet she had a brief conversation with Johnny Gentry, assistant treasurer of the Houston Branch whom Jackson had called on June 14 regarding the pay issue. Gentry asked Dunson whether "that girl call[ed] the grant funders." Dunson answered that she had, and Gentry then stated, "That girl was causing problems." "That girl" had to have been Jackson. No other female employee had taken the lead with regard to the employees' concerns, and Smith had referred to Jackson when speaking with Vickery. Gentry also told Dunson that she had "stirred up a whole lot of trouble as well." Gentry did not testify, and I fully credit the testimony of Dunson.

By letter dated August 3, the Texas Access to Justice Foundation informed Operations Director Wright that the Houston Branch had been awarded the BCLS grant for the upcoming year, September 1, 2010, through August 31, 2011, conditioned upon receipt of an audit for the prior year.

On August 10, Smith spoke privately with paralegal Fields. She called him into her office and stated that she "wanted me to stay out of what was going on in the office," and that "my job would be safe." Fields informed his supervisor, Dunson, of this conversation. He also told administrative assistant Flores. Flores told Fields that Smith had a similar conversation with her.

On August 23, letters dated August 20 were distributed to the employees working under

grants informing them that their employment would end upon expiration of the grant and that, in the event that the grant was renewed, they would have to reapply for their positions. Dunson received her letter from Operations Director Sharonda Wright. Jackson received her letter directly from Executive Director Smith.

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The letter, in pertinent part, states:

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This communication serves to notify all NAACP Houston Branch staff members that upon expiration of employment, and in the event grant funding is renewed or available, all staff members will be required to re-apply for their current or an alternate position . . . and the application process will be available to other interested candidates. . . .

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Jackson e-mailed Smith on August 23 seeking confirmation that, as of August 31, she would be terminated and have to reapply for the position that she already held. Smith responded on the same day that her understating was correct.

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Fields e-mailed Smith on August 27 seeking clarification regarding his status. Within a day or two, Smith spoke with him. She informed Fields that the grants were going to be renewed and that his hours would not be cut. (Fields worked under two grants, and if one was lost his hours would be reduced.) Thereafter, Wright informed Fields that his hours would be reduced.

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Fields, on September 2, sent an e-mail to Smith complaining about the inconsistent information he had received regarding his hours and the reapplication process. In that regard he referred to their private conversation of August 10, stating that Smith had assured him that, "[i]f I stayed out of the stuff going on around here, I would be able to retain my employment."

Smith replied by e-mail on September 3, stating that she did not recall making any statement relating to Fields' hours not being cut and explaining that the audit was awaiting approval. In the e-mail, Smith denied having told Fields that if he "stayed out of the stuff" that he could retain his employment, that she discouraged all employees from involving themselves in "office distractions."

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Regarding the conflicting versions of what Smith said to him on August 10, Fields was asked, "[W]hich one of these [e-mails] is the accurate version of what occurred?" Fields answered, "My email." Smith did not dispute the foregoing testimony. I credit Fields.

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In late August, the record does not establish the exact date, the Houston Branch announced the availability of four positions, the legal advocacy program director, an employment law staff attorney, a paralegal, and an administrative assistant. No deadline for receipt of applications is stated in the announcement; however Smith testified that there was a deadline of September 7.

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Consistent with the representations that Smith had made to Fields and Flores, both were offered employment, Flores on September 13, and Fields on September 15. Both accepted the employment offer. Although the Houston Branch had received resumes from several persons interested in those positions, none were interviewed. At the hearing, Smith asserted that the other applicants were not interviewed because their resumes "weren't that impressive." A pretrial affidavit executed by Smith refers only to rehiring Fields and Flores without interviewing any other applicants because they were "committed to the program" and "wanted to continue to work." There was no mention of unimpressive applications.

Douglas was asked to participate in the interviews for the attorney positions. He became

"involved in the interviewing process, because, at the time, we did not have a lawyer on staff, and the board just felt that that there needed to be a lawyer involved in this whole interviewing process to hire a lawyer for the NAACP." The board of directors had not seen such a need in May, when Smith interviewed Jackson alone even though attorney Dunson was on the staff. Although Douglas referred to "the board," Smith acknowledged that the request for Douglas to participate was made by Scantlebury.

Three applicants were interviewed for the employment law staff attorney position in September. Douglas did not feel that any applicant was qualified, and no one was hired.

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Although the announcement of the four positions named Operations Director Sharonda Wright as the person to contact, the specific job description for the position of the employment law staff attorney states that the applicant's resume and a cover letter should be sent to Executive Director Yolanda Smith. Jackson attempted to apply on September 4, but she entered the e-mail address of Yolanda Smith incorrectly and her resume was not received. Thus she was not interviewed.

Dunson, who had held the position of legal advocacy director for 2 years, applied and was interviewed on October 18 by Douglas and Smith. She was not offered employment.

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In early November, Beverly Spencer, who had no experience with the NAACP, was hired for that position. There is no evidence that there was any announcement of a reopening of the application process. The record does not establish when Spencer applied. Douglas testified that Spencer "came later." Spencer did not testify.

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Jackson had filed a charge with the Board on August 26 relating to the termination of her position. Investigation of that charge resulted in Jackson learning that her resume had not been received. She immediately sent her resume by e-mail on October 4. Wright responded that the deadline for applications had been September 7, and requested that Jackson prove that she had made the attempt to apply on September 4. Although the position was vacant at the time Jackson's application was actually received, she was not called for an interview. On October 25, Jackson filed a charge alleging that the Respondent had failed to consider her for the position.

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Smith and Douglas both claimed that the Houston Branch reopened the application process after no suitable applicant for the employment law staff attorney position was found in September. There is no evidence that, prior to the interviews conducted in November, a separate announcement of the availably of the single position of employment law staff attorney was made. Although Smith claimed that she relied upon Douglas' legal expertise, "his understanding of the role of the attorneys and things like that," she requested that one of the applicants rejected in September be considered when interviewing applicants in November.

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On November 12, Jackson was interviewed for the position that she had held for almost 4 months. Unlike her interview with Smith at the office of the Houston Branch, the interview was held at Texas Southern University in Douglas' office. Smith, Spencer, and Douglas were present. Although Douglas was involved in the September interviews because "we did not have a lawyer on staff," he participated in the November interviews because Spencer, the newly hired legal advocacy program director, "had no experience with the NAACP."

The requirements for the employment law position specifically state that the applicant must have a "minimum of 5 years employment law experience."

Keenya Harrold was hired for the position. The record does not establish that Harrold

had 5 years of employment law experience. She graduated from law school in 2004, and began working for a law firm in Kansas City, Missouri, in September 2004. She moved to that firm's offices in Houston in 2005. The firm, at that time, did not practice employment law. Harrold acknowledged that she "worked on some tort cases early on, like my first and second year of employment," noting that her undergraduate degree was in biology and that she did a lot of product liability work. She later appeared to amend that answer, referring to "the first year." The record does not reflect when the firm actually became involved in employment law. Insofar as it did so after Harrold's "first and second year of employment," Harrold would have had a little over 4 years of employment law experience when she applied for the Houston Branch position in 2010. If the firm began practicing employment law in late 2005, Harrold may have barely had the required 5 years of experience, but the record does not establish that she did. The firm at which Harrold worked was a defense firm, thus Harrold had no experience representing plaintiffs. She recalled working on between 7 and 10 employment cases as part of a team of attorneys. As a younger associate she was doing "most of the grunt work."

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Jackson fully met the requirements for the position. She graduated from law school in 1995, and had been a National Labor Relations Board attorney in Region 15 for 4 years, from 1996 through March 2000.⁴ She was the only attorney appearing on behalf of the General Counsel in two reported Board cases.⁵ Following her Board experience, Jackson had been in private practice for 7 years litigating employment claims. She began practicing employment law with a Houston law firm from 2007, and she did so until hired by the Houston Branch in May 2010. She had argued four cases before the Court of Appeals for the Fifth Circuit. Her undergraduate degree was in business administration. In 1993, she obtained a masters degree in labor and employment relations. Jackson had experience as a mediator and arbitrator. She was the employment law staff attorney position with the Houston Branch for almost 4 months.

Douglas recommended Harrold for the position. Smith accepted his recommendation. Douglas, when asked whether he made "any kind of assessment as to her [Jackson's] abilities," answered, "No." Douglas was asked, "Did you ever review the work that she did for the Branch from the time that she was there?" He answered, "No." By letter dated November 22, Jackson was informed that "another candidate better matched the qualifications, needs, and expectations of the position."

C. Analysis and Concluding Findings

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The complaint alleges that the Respondent, on November 22, refused to hire Tracie Jackson because she had engaged in protected converted activities. Employee activity is concerted when it is "engaged in with or on the authority of other employees," and a respondent violates the Act if, having knowledge of an employee's concerted activity, it takes adverse employment action that is "motivated by the employee's protected concerted activity." *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984). In this case the adverse employment action was the Respondent's failure to rehire Jackson.

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Pursuant to the Board decision in *FES*, 331 NLRB 9, 12 (2000), the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), show that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; that the applicant had

⁴ At the hearing, when Jackson testified to her prior employment by the Board, I confirmed that she had never appeared before me.

⁵ See *Plumbers Local 247 (Inland Industrial)*, 332 NLRB 1029, 1030 (2000); *Elevator Constructors*, JD-84-98 (1998).

experience or training relevant to the announced or generally known requirements of the position; and that antiunion animus contributed to the decision not to hire the applicant. The foregoing analysis also applies when, in the absence of union activity, the refusal to hire is predicated upon protected concerted activity. *Bo-TyPlus, Inc.*, 334 NLRB 523, 529 (2001). The decision of the Board in *Toering Electric Co.*, 351 NLRB 225, 233 (2007), requires that, if an employer adduces evidence that calls into question "the genuineness of an application" for employment, the General Counsel must establish that the individual "was genuinely interested in seeking to establish an employment relationship."

There can be no credible claim that Jackson was not genuinely interested in returning to her former position. Smith asserted that she questioned whether Jackson was interested in the position because, when she advised the employees of the reapplication process, Jackson had stated "I'm straight." Smith did not explain why she concluded that the foregoing comment reflected a lack of interest rather than an affirmation that Jackson understood what Smith had said. Any claim of lack of interest should have been dispelled when Smith received the unfair labor practice charges Jackson filed. Smith ultimately admitted that the "I'm straight" comment by Jackson was "ambiguous." Jackson credibly testified that she would have accepted the position if it had been offered. I find that Jackson was "genuinely interested" in reestablishing the employment relationship that the Respondent had severed.

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Jackson engaged in protected concerted activity and the Respondent was fully aware of her activity. Jackson, due to her background in employment law, took the lead in the employees' effort to be paid on time. Upon learning of the anticipated inability of the Houston Branch to pay employees on time, she informed her fellow employees of their right to file claims with the Texas Workforce Commission. Dunson informed Operations Director Wright of Jackson's action. Jackson requested Executive Director Smith to address the employees, and when Smith did so, Jackson and other employees made comments and asked questions. She expressed the concern of the employees in her e-mail to the board of directors, noting the risk of "possible legal consequences that can arise when an employer fails to pay its employees in a timely manner." Jackson, with other employees, attended the Board meeting, and she spoke first.

The Respondent bore animus towards Jackson's activity. Executive Director Smith told Director of Grants Jonathan Vickery that Jackson was "a problem employee," and informed paralegal Fields that his job was safe if he "stayed out of this stuff." The board of directors also bore animus towards Jackson's protected activities. When responding to the e-mail that Jackson sent to the board of directors, President Scantlebury characterized Jackson's reference to legal consequences as a threat. When the personnel committee met on June 29, one of the agenda items was, "the concerns of the grant employees and their behavior." Animus on the part of the board is further confirmed by the undenied testimony of Dunson that, when she confirmed to Johnny Gentry, the assistant treasurer of the board of directors, that "that girl," Jackson, had called the funders, he stated, "That girl was causing problems." I find that the protected concerted activity in which Jackson engaged was a substantial and motivating factor in the failure of the Respondent to rehire her.

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Insofar as the General Counsel established that the protected concerted activity in which Jackson engaged was a substantial and motivating factor in the failure of the Respondent to rehire her, it was incumbent upon the Respondent to show that Jackson would not have been rehired in the absence of her protected concerted activity. The Respondent did not do so.

The failure of the Respondent to hire Dunson, who had been on the staff for 2 years, and Jackson, who had been on the staff for almost 4 months, and replacing them with employees who had no experience with the NAACP is persuasive evidence that the failure of the

Respondent to hire them was because of their participation in protected concerted activity. Dunson, who made common cause with Jackson and the employees, was a statutory supervisor and is not alleged as a discriminatee. Dunson and Jackson were the only individuals not hired as a result of the reapplication process.

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The Respondent was obviously hiring, having rejected the three applicants for the employment law staff attorney position who had applied in September. When the grant for the position under which attorney Lakeshia Vaughn Jackson had been working expired in 2011, she was rehired. There were no other applicants for the position. She was interviewed only by Beverly Spencer, her direct supervisor. Douglas was not involved in the interview.

In October 2010, when Jackson applied to the correct e-mail address, the employment law staff attorney position was vacant. No applicant who had applied prior to the purported deadline had been found to be qualified. Jackson, who was fully qualified, was not interviewed or rehired. Instead, the Respondent claims that it reopened the application process for the employment law staff attorney position. Although purportedly reopened, there is no evidence of any announcement of the availability of that single position. There is no evidence that the application process for the legal advocacy program director position was reopened. Dunson was rejected, the position was vacant, and Beverly Spencer was hired.

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The Respondent herein took the unprecedented action of involving Douglas in the interview process purportedly "because, at the time, we did not have a lawyer on staff, and the board just felt that that there needed to be a lawyer involved." The board of directors had not seen such a need in May, when Smith interviewed Jackson alone even though Director Dunson was on the staff. In November there was a lawyer on the staff, the newly hired legal advocacy Program Director Spencer, but Douglas nevertheless participated in the interviews. They were held in his office.

Harrold was hired. Douglas testified that "the depth of her [Harrold's] experience and the quality of her experience was much greater" than that of Jackson. I do not credit Douglas regarding his alleged assessment of the depth and quality of experience of Harrold as compared to Jackson. Harrold, so far as this record shows, had never individually taken a case to trial and had never argued a case before either a State or Federal court of appeals. She had no experience in mediation. She had worked on between 7 and 10 employment cases as part of a team of attorneys doing "most of the grunt work." The firm at which Harrold worked had no employment law section when she became an associate. It was a defense firm, thus she had no experience representing plaintiffs. She had no experience with the NAACP. Jackson had served as a plaintiff's attorney in multiple cases, had been the sole representative of the General Counsel in two reported Board cases, and had argued before the Court of Appeals for the Fifth Circuit. She had served as a mediator/arbitrator for the United States Postal Service. There is no claim or evidence that she did not satisfactorily perform her job as the employment law staff attorney for the Houston Branch from May 3 until August 31. How Douglas could honestly conclude that Harrold's depth and quality of experience performing grunt work with a team of attorneys at a large law firm as compared to Jackson's experience in several different forums is incomprehensible. I do not credit that testimony.

Douglas testified that he was impressed with Harrold's "intellectual capability" as established by her graduating magna cum laude from law school, being on the law review, and serving as an intern for a Federal judge. Harrold's resume reflects that her internship was a summer internship after her first year of law school. Harrold did not serve as a clerk to a Federal judge. Being on law review and graduating magna cum laude are admirable academic accomplishments but, as pointed out in the brief of counsel for the General Counsel, it is not

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apparent "how the grades she [Harrold] earned in law school would make her more qualified for the employment attorney position rather than an experienced employment attorney [such] as Jackson." Jackson had earned a masters degree in labor and employment law. Douglas did not address Jackson's academic credentials which included the masters degree as well as certification in mediation and training in arbitration.

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Notwithstanding Smith's claim that she relied upon the recommendations of Douglas, he testified that she "wanted to look at somebody we already interviewed . . . [s]o there were actually three people" in the November interviews. The Respondent, prior to those interviews, would not have known whether Harrold was suitable. Jackson was the only other applicant. I question whether Smith's action, including an applicant who had previously been rejected, was taken in order to assure that the position would be awarded to someone other than Jackson.

Harrold's application states that her reason for leaving the law firm with which she was associated was because "the practice group was acquired by another firm." At the interview, according to Douglas, Harrold represented that she got tired of working with a major law firm. Harrold, who testified prior to Douglas, was not questioned regarding why she ceased working for the firm. So far as this record shows, Douglas did not inquire whether she declined a position with the firm that acquired the "practice group," or whether she was not offered a position. He did not testify to having contacted the law firm with which Harrold had most recently worked to confirm her experience or the reason she left.

The NAACP was hiring an advocate for persons who did not have the ability to advocate on their own behalf. Jackson had experience doing just that, most recently as the employment law staff attorney at the Houston Branch. Although Harrold had never represented plaintiffs, Douglas discounted her lack of experience stating that it did not matter "which side of the fence you're batting from." Harrold had never "batted." Harrold had never been the sole attorney responsible for presenting a case on behalf of a group or individual. She had no experience as a single advocate in the trenches. Her experience with the law firm involved working as a member of a team of attorneys doing "grunt work." Jackson's experience individually advocating on behalf of individuals began in 1996 with the NLRB and continued through August 31.

Douglas, when asked whether he made "any kind of assessment as to her [Jackson's] abilities," answered, "No." Douglas, an academician, did not consider or give credit to Jackson for her practical experience and history of representing persons claiming discrimination against them for unlawful reasons. Douglas was asked, "Did you ever review the work that she did for the Branch from the time that she was there?" He answered, "No."

The foregoing admissions by Douglas, that he made no assessment of Jackson's abilities or even review her performance in the very position for which she was applying, establish that the refusal to hire Jackson for her former position was a foregone conclusion dictated by Executive Director Smith at the direction of the board of directors.

I find that the Respondent brought Douglas into the interview process in an attempt to give the Respondent a nondiscriminatory basis for refusing to rehire Jackson. I find that the attempt failed. Notwithstanding Spencer's lack of experience with the NAACP, there is no evidence that she could not have competently determined which applicants had the experience necessary to serve as the employment law staff attorney for the Houston Branch. As discussed above, Jackson was more qualified than Harrold for the position that the Respondent was seeking to fill. The Respondent has not shown that Jackson would not have been hired in the absence of her protected concerted activities. The Respondent, by refusing to hire Jackson because of her protected concerted activities, violated Section 8(a)(1) of the Act.

Conclusions of Law

By refusing to hire Tracie Jackson on November 22, 2010, because of her protected concerted activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily refused to hire Tracie Jackson, it must offer her instatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis, from November 22, 2010, to date of proper offer of instatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

The Respondent will be ordered to post and e-mail an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommende 6

ORDER

The Respondent, NAACP Houston Branch, Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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(a) Failing and refusing to hire job applicants because of their protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of the Board's Order, offer immediate employment to Tracie Jackson or, if such position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges.
- (b) Make Tracie Jackson whole for any loss of earnings and benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of this decision.

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- (c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (d) Within 14 days after service by the Region, post at its facilities in Houston, Texas, copies of the attached notice marked Appendix.⁷ Copies of the notice, on forms provided by the Regional Director for Region 16 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 22, 2010.
- (e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., July 15, 2011

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	George Carson II Administrative Law Judge
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⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT fail and refuse to hire you because of your participation in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from of the date of this Order, offer immediate employment to Tracie Jackson in the position for which she applied, or, if such position no longer exists, to a substantially equivalent position.

WE WILL make Tracie Jackson whole for any loss of earnings and benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of this decision.

		NAACP HOUSTON BRANCH (Employer)		
	,			
Dated	Ву			
		(Representative)	(Title)	

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

819 Taylor Street, Room 8A24, Fort Worth, TX 76102-6178 (817) 978-2921, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (817) 978–2925.